(27,625)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 870.

JOHN B. SUTTON, TRUSTEE OF THE ESTATE OF HILLSBORO DREDGING COMPANY, BANKRUPT, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition and amended petition	1	1
Exhibit "A"—Agreement	4	3
General traverse	32	20
Argument and submission of case	32	20
Findings of fact	33	20
Conclusion of law	36	23
Opinion by Campbell, Ch. J	36	23
Dissenting opinion by Hay, J	39	27
Judgment of the court	43	30
Claimant's application for appeal	43	30
Clerk's certificate	44	31

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 24, 1920.

1 I. *Petition and Amended Petition.*

Court of Claims.

No. 33983.

JOHN B. SUTTON, Trustee of the Estate of Hillsboro Dredging Company, a Corporation, Bankrupt,

vs.

THE UNITED STATES.

On August 1, 1918, the claimant filed his original petition.

Subsequently, to wit, on November 25, 1918, by leave of court, the claimant filed his amended petition which is as follows:

Amended Petition.

To the Honorable Court of Claims:

The petition of John B. Sutton respectively represents:

That your petitioner is the duly appointed trustee of the Hillsboro Dredging Company, a corporation, bankrupt, and the said trustee brings this suit in behalf of the estate of said company.

That under date of January 21st, 1913, the said company entered into a contract with the United States Engineers, War Department, copy of which contract is hereto attached and marked Exhibit "A," for doing certain dredging in the channel between Clearwater Harbor and Tampa Bay, Florida, and in the narrows between Clearwater Harbor and Boca Ceiga Bay. The work contemplated was divided into six sections designated as follows: 11, J. K. L M. and P.

2 Under the direction of the contracting officer in charge the work was begun at the northerly end of section 11 and all work in sections 11, J and K was completed respectively August 7, 1913, August 26, 1913 and September 12, 1913. From August 27th, 1913, until work was ended in order to facilitate the work, the defendant's contracting officer directed the dredge to be moved and to work alternately in sections K. L. M. and P. The said dredge was working in section P. May 15, 1914, when the defendant's contracting officer ordered the said company to cease work for the alleged reason that funds for the payment of the same had been exhausted and thereupon all work ceased.

The defendants made monthly estimates and payments for the dredging as the work proceeded, but in making said estimates the defendants under-estimated the amount of work that had been done by the said company, so that when said work ceased as aforesaid said defendants stated that the said company had dredged in sections L. M. and P. 1846.33 cubic yards more than there were funds ap-

propriated to pay for, which at contract rates of $1.65 per cubic yard amounted to $3,046.44. Thereupon the contracting officer by and upon the approval of the Chief of Engineers advised the said company that the said amount due could not then be paid, but that as soon as appropriation was made, the said sum would be paid.

Under the Act of October 1st, 1914 (38 State, 725), the Secretary of War allotted $12,000.00 for the completion of the channel here in question, and out of this sum paid the said company the said $3,046.44, and with the balance completed the channel in question at an average cost of $2.81 per cubic yard.

Thereafter the Auditor for the War Department suspended the said amount in the officer's accounts and subsequently deducted from other monies due said company under contract, attached
3 hereto, made a part hereof and marked Exhibit "B," dated May 26, 1914, entered into with the defendant for dredging the channel of the Wacamaw River, the said sum of $3,046.44 against which deduction the said company protested and for which claim is now made. The defendant received the benefit of the said dredging, and the same was reasonably worth $1.65 per cubic yard.

In addition the said company blasted 1,600 cubic yards in said sections, L. M. and P. which blasted material the said company was unable to remove, because the contract was ended as aforesaid, and for which the company has never been paid. The said blasting was reasonably worth $1.00 per cubic yard, and as the defendant has received the benefit thereof, claim is herewith submitted for said blasting in the sum of $1,600.00.

That the said company filed this claim before the accounting officers of the Treasury Department who disallowed the same.

That your petitioner is the sole owner of this claim and is the only interested party therein, and no assignment or transfer of this claim, or any part thereof, or interest herein has been made.

That your petitioner is justly entitled to the amount claimed from the United States after allowing all just credits and offsets.

Wherefore, Petitioner prays that the Court may find that he is entitled to refund of said $3,046.44 and $1,600.00 for blasting done in Sections L. M. and P. and that judgment be entered against the United States for the total sum of $4,646.44, that the Court may grant such other relief as the nature of the case may require, or the Court may deem proper.

JOHN B. SUTTON,
Trustee of the Estate of the Hillsboro Dredging Co., a Corporation, Bankrupt,
By M. WALTON HENDRY,
Attorney in Fact.

4 DISTRICT OF COLUMBIA, *ss:*

M. Walton Hendry, being duly sworn, deposes and says: I am the attorney in this case; I have read the above petition and the matters therein stated are true to the best of my knowledge and belief.

M. WALTON HENDRY.

Subscribed and sworn to before me this 23d day of Nov. 1918.

JOHN F. A. BECKER,
Notary Public, D. C.

EXHIBIT A.

Annexed to Petition.

These Articles of Agreement entered into this 21 day of January, nineteen hundred thirteen between J. R. Slattery, Captain, Corps of Engineers, United States Army, hereinafter designated as the contracting officer, representing the United States of America, of the first part and Hillsboro Dredging Company, of Tampa, in the county of Hillsboro, State of Florida, hereinafter designated as the contractor, of the second part, Witnesseth, that the said parties do hereby covenant and agree, to and with each other, as follows:

Article 1. In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish to the satisfaction of the contracting officer, the necessary plant, labor and material required for a vigorous prosecution of the work of dredging and rock removal in channel from Clearwater Harbor to Tampa Bay, Florida, and do the work at the localities set forth and in the manner described in the attached specifications.

That payment shall be made to the contractor, according to the provisions of the attached specifications and at the following rates:

For dredging in Sections H and J, fifteen and one-half cents (15½¢) per cubic yard.

For dredging in Sections K, L, M, and P, one dollar and sixty-five cents ($1.65) per cubic yard.

Article 2. All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as do not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and quantity shall be final.

Article 3. The contractor shall commence the undertaking covered by this contract as set forth in paragraph 14 of the attached specifications, and shall prosecute the work, perform the services, and furnish and deliver the materials at a rate sufficient, in the opinion of the contracting officer, to secure completion within the contract time, as set forth in the paragraph of the specifications above cited. Should the contractor fail to make such progress the contracting officer shall have power, after ten days' notice in writing to the contractor, to employ such additional plant or labor to purchase such materials and to liquidate such obligations of the contractor, as the contracting officer may deem necessary to put the work in a proper state of advancement, or to insure the proper completion of the undertaking within the time specified; and any excess cost thereof,

over what the work, services, or materials would have cost at the contract rate or rates shall be a charge against any sums due or to become due to the contractor, or such excess cost may be recovered from the contractor and his surety or sureties. This provision, however, shall not be construed to affect the right of the
6 United States to take the work out of the hands of the contractor, as provided in Article 4 hereof, and to secure completion of the undertaking by contract or otherwise, in accordance with law. The right is reserved to assume the capacity of the contractor's plant and force on the work, or the past rate of progress and other ascertainable indications of ability and intention to continue or proceed as required, as a measure of probable future progress.

Article 4. If the contractor shall delay or fail to commence with the delivery of the material or the performance of the work as specified herein, or shall, in the judgment of the contracting officer fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract then, in either case, the contracting officer shall have power, with the prior sanction of the Chief of Engineers, to take the work out of the hands of the contractor by giving notice in writing to that effect to the contractor and his surety or sureties; and upon the giving of such notice all payments to the contractor under this contract shall cease, and all money or reserved percentage due or to become due thereunder shall be retained by the United States until the final completion and acceptance of the work herein stipulated to be done; and the contracting officer shall have the right to proceed forthwith to secure the delivery of material, or the performance of the work, by contract or otherwise, in accordance with law; and whatever sums may be expended by the United States in completing the said contract in excess of the price herein stipulated to be paid the contractor for completing the same, and also all costs of inspection and superintendence, including all necessary traveling expenses connected therewith, incurred by the United States, in excess of those payable by the United States during the period herein allowed for
7 the completion of the contract by the contractor shall be charged to the contractor, and the United States shall have the right to deduct such excess cost out of or from any money or reserved percentage retained as aforesaid, or to recover the same, or any part thereof, from the contractor and his surety or sureties.

Article 5. If the contractor shall fail to deliver the material or to prosecute the work covered by this contract so as to complete the same within the time agreed upon, then, in lieu of taking the work out of the hands of the contractor as provided in Article 4 of this agreement, the contracting officer, with the prior sanction of the Chief of Engineers may waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the contracting officer. Should the time limit be thus waived, all expenses for inspection and superintendence after the date fixed for completion, including all necessary traveling expenses connected therewith, and all other actual losses and damages to the United States due to the delay beyond the time originally set for

completion, shall be determined by the contracting officer and deducted from any payments due or to become due the contractor: Provided, however, that no charge for inspection and superintendence shall be made for such period after the date fixed for completion of this contract, as, in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work, ordered by the contracting officer, or on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforseenable cause
8 of delay arising through no fault of the contractor, and which actually prevented such contractor from delivering the material or commencing or completing the work within the period required by the contract. The findings of the Contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final. But such waiver of the time limit and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract, nor be construed to prevent action under Article 4 hereof in case the contractor shall fail, in the judgment of the contracting officer, to make reasonable and satisfactory progress after such waiver of time limit.

Article 6. If, at any time during the life of this contract, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve a material change in the character or quantity of labor or material to be furnished, or in any other provision of the contract, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor, or the other provisions thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made in accordance with such supplemental or modified agreement unless the same was signed and approved before the obligation arising from such modification was incurred.

Article 7. No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract,
9 and not expressly bargained for and specifically included therein, unless such extra work or material shall have been expressly required in writing by the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

Article 8. The contractor shall be responsible for and pay all liabilities incurred for labor and material in the prosecution of the work.

Article 9. Until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

Article 10. The contractor shall hold and save the United States, and all officers and agents thereof, harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the material hereby agreed to be furnished and work to be done under this contract.

Article 11. Payments shall be made to the contractor as prescribed in Article 1 of this agreement, and in paragraph 16 of the attached specifications.

Article 12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferer or the transferee, but all rights of action for any breach of this contract by the contractors are reserved to the United States.

10 Article 13. No Member of or Delegate to Congress, or Resident Commissioner, nor any person belonging to or employed in the military service of the United States, is, or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom; but, under the provisions of Section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109), this stipulation, so far as it relates to Members of or Delegates to Congress or Resident Commissioners, shall not extend, or be construed to extend, to any contract made with an incorporated company for its general benefit.

Article 14. The term "contracting officer," wherever used in this contract, shall include the duly appointed successor of such officer.

Article 15. In performance of this contract, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by Courts of the several States, Territories, or municipalities having criminal jurisdiction, is prohibited.

Article 16. Cancelled.

Article 17. Cancelled.

Article 18. This contract shall be subject to the approval of the Chief of Engineers, U. S. Army; and such approval, when given, shall relate back to, and be operative from, the date of the execution of the Contract.

In Witness Whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written, Articles 16 and

17 having been canceled with our knowledge and consent, such elimination being hereby agreed to.

Witnesses:

H. B. WOODWARD as to

J. R. SLATTERY,
Captain, Chief of Engineers, U. S. A.

11 JOHN F. GALLIE, SR.,

THOS. J. O'NEILL as to

HILLSBORO DREDGING CO.,
By W. H. CALDWELL,
Treas. & General Manager.

(Executed in Triplicate).

Approved February 21, 1913.
W. H. BIXBE,
Chief of Engineers,
U. S. Army.

Improving Channel from Clearwater Harbor to Tampa Bay, Fla.

War Department.

Advertisement.

U. S. Engineer Office,
Jacksonville, Fla., Nov. 27, 1912.

Sealed proposals for dredging and rock excavation in channel from Clearwater Harbor to Tampa Bay, Florida, will be received at this office until 12 o'clock noon, December 30, 1912, and then publicly opened. Information on application.

J. H. SLATTERY,
Captain, Engineers.

General Specifications.

1. No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed. At
12 the option of bidders certified checks for the amount of the guaranty required may be furnished in place of guaranty.

2. All bids and guaranties must be made in triplicate upon printed forms to be obtained at this office.

3. Each individual guarantor will justify in the sum of two thousand dollars ($2,000). The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Statutes, 487, Chap. 120, and is expressed in the guaranty attached to the bid.

4. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount approximately equal to and not less than fifty percentum (50%) of the estimated amount of the contract

within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which may be inspected at this office, and will be furnished if requested, to parties proposing to submit bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract. The right is reserved to reject any or all bids, and waive any informalities in the bids received.

5. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for dredging in channel from Clearwater Harbor to Tampa Bay, Fla., to be opened December 30, 1912," and enclosed in another sealed envelope addressed to Captain J. R. Slattery, Corps of Engineers, U. S. Army, Jacksonville, Florida, but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

6. Whenever the term "contracting officer" is used in the
13 specifications it is understood to refer to the officer of the Corps of Engineers, U. S. Army, in charge of the work. He will be represented on the work by as many assistants as may be necessary. Whenever the term "contractor" is used it is understood to refer to the second party to the contract. Subcontractors, as such, will not be recognized.

7. It is understood and agreed that the quantities given in these specifications are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work.

8. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

9. It is understood and agreed that the contractor assumes full responsibility for the safety of his employees, plant, and materials, and for any damage or injury done by or to them from any source or cause.

10. In the prosecution of the work herein specified, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by Courts of the several States, Territories, or municipalities having criminal jurisdiction is prohibited.

11. The contractor will be required to discharge any employee who, in the opinion of the contracting officer, is objectionable or incompetent. Such discharge shall not be made the basis of any claim for compensation or damage against the United States or any of its officers or agents.

14 12. The contractor must at all times either be personally present upon the work or be represented thereon by a responsible agent, who shall be clothed with full authority to act for him in all cases, and to carry out any instructions relative to the work which may be given by the contracting officer, either personally or through an authorized representative.

13. No work shall be done on Sundays or days declared by Congress as holidays for per diem employees of the United States except in cases of emergency, and then only with the consent of the contracting officers; nor shall any work be done at night unless authorized in writing by the contracting officer.

14. The contractor will be required to commence work under the contract within ninety (90) days after the date of receipt of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it within nine (9) months after said date of receipt of notification (see also paragraph 23).

15. The time allowed in those specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience, unless extraordinary and unfor-seeable conditions supervene.

16. Payments will be made monthly, based on estimates of work satisfactorily completed during the preceding month. A percentage of ten (10) per centum will be reserved from each payment until the completion and acceptance of the work to be done under the contract, based on these specifications.

15 *Detailed Specifications.*

I. Description of the Site and Work.

17. Location. The work contemplated in this contract is divided into six sections designated by the letters H, J, K, L, M and P. These sections are contiguous, and are located in the narrows between Clearwater Harbor and Boca Ceiga Bay. Work will begin at the southerly end of Section P and continue through the channel northerly to and including Section H, or may begin at the northerly end of Section H and continue southerly to and including Section P. The length and width of the respective sections and the quantity in each are approximately as follows:

Section.	Width in feet.	Length in feet.	Quantity in cubic yards. Soft material.	Rock.
H	50	1,040	5,100	
J	50	935	7,800	
K	50	160	232	25
L	50	335	160	880
M	50	1,200	1,360	3,322
P	50	2,528	3,213	1,012
Totals			17,865	5,239

Bidders are invited to make independent computations from plans on file in this office before submitting their bids, as the United States does not guarantee the accuracy of the above estimates.

18. Maps, Data, etc., Detailed maps marked "drawings 515A, 515B, 515C, drawer 89" which form a part of these specifications showing the location and latest soundings and borings taken
16 on the various areas, may be seen at this office and should be examined by intending bidders, before submitting proposals. The mean range of tide is 1.5 feet.

19. Work to be Done. The channel, shall be made 50 feet wide at the bottom and not less than five feet deep at mean low water. Where changes of direction occur the width of channel shall be increased 25 to 50 feet, depending upon the angle of intersection, as directed by the contracting officer.

It is contemplated to award the work as a whole to one bidder.

II. Conduct of the Work.

20. Disposal of Excavated Material. The material excavated shall be deposited on one or both sides of the completed channel, as directed by the contracting officer. It must be placed so that none of the deposited material will approach the edge of the completed channel, nearer than 25 feet, unless placed behind bulkheads of suitable design.

Any material that is deposited elsewhere than in places designated and approved by the contracting officer will not be paid for, and the contractor may be required to redredge such material and deposit it where directed. The dumping ground must be plainly marked by conspicuous buoys, or stakes, and no dumping shall be done unless an inspector is present at the time.

21. Order of Work. The work is to be carried on as provided in paragraph 17, but subject to such changes as may be directed by the contracting officer. The location and limits of the work will be plainly indicated in advance by stakes and ranges, or otherwise (See paragraph 30).

17 The contractor may be required to suspend dredging at any time when for any reason the gauges or ranges can not be seen or properly followed.

22. Removal of Logs, Snags, etc. If logs, snags, stumps or wrecks are encountered within the limits of dredging the contractor shall (if required to do so by the contracting officer) remove the same and deposit them as directed. Payment shall be made per hour, for the time actually and necessarily consumed in the work, at a rate equal to the average hourly earnings of the dredge for the last preceding two weeks, when at its regular work, but not less than the average hourly earnings from the beginning of the contract.

23. Rate of Progress. Work must be commenced and prosecuted as provided in paragraph 14. If at any time after the date fixed for beginning work it shall be found that operations are not being carried on at a rate sufficient, in the opinion of the contracting officer, to secure completion in the contract time, the contracting officer shall have the power, after ten days' notice in writing to the contractor, to employ such additional plant or labor or to purchase such material as may be necessary to put the work in a proper state of advancement; and any excess of cost thereof over what the work would have cost at the contract rate shall be a charge against any sums due or to become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract as provided for in the form of contract to be entered into. The right is reserved to assume the capacity of the plant and force actually on the work as a measure of probable future progress.

24. Lights. The contractor shall keep proper lights each night, between the hours of sunset and sunrise, upon all floating 18 plant connected with the work, upon all ranges and other stakes in connection with it, when necessary, and upon all buoys large enough and so situated as to endanger or obstruct navigation, and shall be responsible for all damages resulting from any neglect or failure in this respect.

25. Destruction. The contractor will be required to conduct the work in such manner as to obstruct navigation as little as possible, and at the completion of the work shall remove his plant, including ranges and buoys, piles, etc., placed by him under the contract in navigable waters. In case the contractor's plant so obstructs the channel as to impede the passage of vessels, it shall promptly be so moved as to afford a practicable passage on the approach of any vessel.

26. Misplaced Material. Should the contractor, during the progress of the work, lose, dump, throw overboard, sink or misplace any material plant, machinery, etc., which in the opinion of the contracting officer, may be dangerous to or obstruct navigation, he shall recover and remove the same with the utmost dispatch. The contactor shall give immediate notice, with description and location

of such obstructions, to the contracting officer or inspector, and, when required, mark or buoy such obstructions until same are removed. Should he refuse, neglect, or delay compliance with the above requirement, such obstructions may be removed by the contracting officer, and the cost of such removal may be deducted from money due or to become due the contractor.

27. Liability of Contractor. The contractor will be responsible that his employees strictly observe the laws of the United States affecting operations under the contract. He will be expected to comply with the laws of the United States and of the State as to the inspection of boilers, hulls, etc., and the licensing of masters,
19 engineers, etc. He shall conform to such sanitary requirements as may be prescribed by the contracting officer.

III. Quality and Character of Material.

28. In Sections II and J, the material to be removed is believed to be sand, mud and shell, and in Sections K, L, M, and P, ledge rock overlaid with sand, mud and shell, but bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description.

The price bid per cubic yard for dredging in Sections II and J shall cover the cost of removal and disposition of all material encountered except ledge rock, and the price bid per cubic yard for dredging in sections K, L, M, and P shall cover the cost of removal and disposition of all material encountered including ledge rock. If ledge rock should be encountered in Section- II and J, the same price will be paid for its removal as is paid for work in Sections K, L, M and P.

IV. Plant.

29. Proposals will state the character and capacity of the plant proposed to be employed by the contractor. The plant shall be at all times kept in condition for efficient work and shall be subject to the inspection and approval of the contracting officer.

All scows must be kept in good condition, the coamings kept repaired, and the pockets provided with proper doors and appliances, so that no leakage of material will occur.

20

V. Supervision.

30. The work will be conducted under the general direction of the contracting officer and will be inspected by inspectors appointed by him, who will enforce a strict compliance with the terms of the contract. The inspectors will keep a record of the work done, and see that the tide gauges, ranges, etc., are kept in proper order. The contractor will be required to facilitate the work of the inspectors in all possible ways and will furnish, on their request, such boats, boatmen, laborers, and material as may be necessary in laying out the work,

inspecting or supervising the same. All ranges, stakes, tide gauges, buoys, and anchors, with rope and other materials needed for the proper execution and inspection of the work, will be furnished and maintained in good order by the contractor. When required suitable transportation from all points on shore, designated by the contracting officer, to and from all work, dredges and dumping grounds, shall be provided by the contractor. The cost of meeting all the foregoing requirements must be included in the price bid.

31. Accommodations for Inspectors, etc. The contractor shall provide suitable office room on board the dredge or dredges for the inspectors and satisfactory board and lodging on the plant for all employees of the United States engaged on the work, free of cost to the United States.

VI. Quantity of Materials.

32. The total estimated quantity of material to be removed to complete the work to be done as stated in paragraph 17 is 12,900 cubic yards, place measurement in Sections II and J, and 10,144 cubic yards, place measurement, in Sections K, L, M and P of
21 which latter amount 5,239 cubic yards is ledge rock. These amounts will be used as a basis in canvassing bids. Within the limits of available funds the United States reserves the right to require the removal of such yardage as will complete the work described in paragraphs 17 and 19 be it more or less than the quantity above estimated, and final payment will not be made until the work is so completed.

VII. Measurement and Payment.

33. Place Measurement. The material removed will be measured by the cubic yard in place from surveys made in each section just before dredging (paragraph 18) and soundings made in the wake of the dredge as the work progresses. These soundings will be taken at short intervals on a line normal to the direction of the cut. Final acceptance of the work and deductions for overdepth dredging (paragraph 35) will be based on the result of these soundings and will not therefore be re-opened except on evidence of collusion, fraud or obvious error.

34. When necessary for any cause to convert, "scow measurement" into "place measurement" or the reverse, 6 yards of the former will be taken as the equivalent of 5 yards of the latter.

35. Overdepth Dredging, Shoaling, and Side Slopes. To cover mechanical inaccuracies of dredging processes, material actually removed to a depth of not more than one foot below the required depth will be estimated and paid for at full contract price. To secure stable banks for the dredged cut, material removed in making side slopes not flatter than 1 on 3, whether dredged in situ from the slopes or as overdepth at top of slope sufficient to provide for sloughing of banks

to this slope, will be estimated and paid for. Material taken
22 from beyond the limits above described will be deducted from the estimates as excessive overdepth dredging or excessive side slopes, and will not be paid for. No payment will be made for material dredged outside the specified limits, as shown by soundings unless the same is specifically ordered in writing by the contracting officer before the excavation is made.

VII-. Miscellaneous Provisions.

36. Experience. Bidders shall further state, on the form appended and in accordance with the directions thereon, whether they are now *on* ever have been engaged on any contract or other work similar to that proposed, the year in which it was done, and the manner of its execution, and shall give such other information as will tend to show their ability to prosecute vigorously the work required by these specifications. Any bid not complying with the instructions may be rejected.

37. Claims and Protests. If the contractor considers any work required of him to be outside the requirements of the contract or considers any record or ruling of the inspectors or contracting officers as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within ten days thereafter or be considered as having accepted the record or ruling.

38. Minor Modifications. The right is reserved to make such minor changes in these specifications as, in the judgment of the contracting officer, may be necessary or expedient to carry out the intent of the contract, and no increase in price shall be paid the contractor on account of such changes, except as provided in the form of contract to be entered into.

23 IX. Proposal and Contract.

39. Bids will be submitted on blank forms to be obtained at this office. The form has an entry for each item of work or material on which estimates will be given or payments made, and no other allowances of any kind will be made unless specifically provided for in the specifications or contract.

A bid for the entire work must have each blank filled.

The quantities of each item of the proposal as finally ascertained at the close of the contract in the units given, and the unit prices of the several items stated by the bidder in the accepted bid, will determine the total payments to accrue under the contract. The unit price bid for each item must allow for all collateral or indirect cost connected with it.

United States Engineer Office, Jacksonville, Fla.,

November 22, 1912.

These articles of agreement entered into this twenty-sixth day of May, nineteen hundred and fourteen (1914), between Major G. P. Howell, Corps of Engineers, United States Army, hereinafter designated as the contracting officer, representing the United States of America, of the first part, and Hillsboro Dredging Company, Tampa, in the county of Hillsboro, State of Florida, hereinafter designated as the contractor, of the second part, Witnesseth, that the said parties do hereby covenant and agree, to and with each other, as follows:

Article 1. In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish all necessary labor, materials, plant and appliances, and therewith execute the work of dredging in Wacamaw River, N. C. and S. C., to form a channel in general twelve (12) foot deep at mean low water with a bottom width of eighty (80)
24 feet; (first section—lower portion of work) beginning at Bulls Creek, S. C., and for a distance of about (13) miles, over which the work of the dredging will be in the nature of "skimming" to form the required channel, removing approximately 55,000 cubic yards of material; thence (second section—main portion of work) continuing the twelve-foot channel as far as available funds will permit, after providing for (third section—upper part of work) a channel eight (8) feet deep at mean low water with bottom width of eighty (80) feet, from the point reached by the twelve-foot channel to Conway, S. C., for which a sufficient sum will be reserved from available funds (pars. 20 and 21 of specifications).

For and in consideration of the above and foregoing the contracting officer shall make payments monthly to the contractor at the rate of Twenty-three (23) cents per cubic yard for material dredged and removed from the first and third sections of the work, and at the rate of Thirteen 7/10 (13.7) cents per cubic yard for material dredged and removed from the main portion (second section) of the work, the quantities removed to be determined in accordance with paragraphs 24, 25, 26 and 27 of specifications and for meals furnished in accordance with paragraph 35 of specifications at the rate of Twenty-five (25) cents per person for each meal.

Deductions will be made from each estimate for dredging in an amount often (10) per cent of the estimate until the work is one-half completed; after which the retained percentages will be reduced, as stated in paragraph 17 of specifications, to One thousand, five hundred dollars ($1,500), which will be retained until completion of contract and paid with final payment.

Article 2. All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector ap-
25 pointed on the part of the United States, and such as may not conform to the specifications of this contract shall be rejected.

The decision of the contracting officer as to quality and quantity shall be final.

Article 3. The contractor shall commence the undertaking covered by this contract as set forth in paragraph fifteen of the attached specifications, and shall prosecute the work, perform the services, and furnish and deliver the materials at a rate sufficient, in the opinion of the contracting officer, to secure completion within the contract time, as set forth in the paragraph of the specifications above cited. Should the contractor fail to make such progress the contracting officer shall have the power, after ten days' notice in writing to the contractor, to employ such additional plant or labor, to purchase such materials, and to liquidate such obligations of the contractor, as the contracting officer may deem necessary to put the work in a proper state of advancement, or to insure the proper completion of the undertaking within the time specified; and any excess cost hereof, over what the work, services, or materials would have cost at the contract rate or rates shall be a charge against any sums due or to become due to the contractor, or such excess cost may be recovered from the contractor and his surety or sureties. This provision, however, shall not be construed to affect the right of the United States to take the work out of the hands of the contractor, as provided in Article 4 hereof, and to secure completion of the undertaking by contract or otherwise, in accordance with law. The right is reserved to assume the capacity of the contractor's plant and force on the work, or the past rate of progress and other ascertainable indications of ability and intention to continue or proceed as required, as a measure of probable future progress.

26 Article 4. If the contractor shall delay or fail to commence with the delivery of the material or the performance of the work as specified herein, or shall in the judgment of the contracting officer fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case, the contracting officer shall have power, with the prior sanction of the Chief of Engineers, to take the work out of the hands of the contractor by giving notice in writing to that effect to the contractor and his surety or sureties; and upon the giving of such notice all payments to the contractor under this contract shall cease, and all money or reserved percentage due or to become due thereunder shall be retained by the United States until the final completion and acceptance of the work herein stipulated to be done and the contracting officer shall have the right to proceed forthwith to secure the delivery of the material, of the performance of the work, by contract or otherwise, in accordance with law; and whatever sums may be expended by the United States in completing the said contract in excess of the price herein stipulated to be paid the contractor for completing the same, and also all costs of inspection and superintendence, including all necessary traveling expenses connected therewith incurred by the United States in excess of those payable by the United States during the period herein allowed for the completion of the contract by the contractor shall be charged to the contractor, and the

United States shall have the right to deduct such excess cost out of or from any money or reserved percentage retained as aforesaid, or to recover the same, or any part thereof, from the contractor and his surety or sureties.

Article 5. If the contractor shall fail to deliver the material or to prosecute the work covered by this contract so as to complete the same within the time agreed upon, then, in lieu of taking the
27 work out of the hands of the contractor as provided in Article 4, of this agreement, the contracting officer, with the prior sanction of the Chief of Engineers may waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the contracting officer. Should the time limit be thus waived, all expenses for inspection and superintendence after the date fixed for completion, including all necessary traveling expenses connected therewith, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion, shall be determined by the contracting officer and deducted from any payments due or to become due the contractor: Provided, however, That no charge for inspection and superintendence shall be made for such period after the date fixed for completion of this contract, as, in the judgment of the contrac-ing officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer, or on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from delivering the material or commencing or completing the work within the period required by the contract. The findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final. But such waiver of the time limit and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract, nor be construed to prevent action under Article 4
28 hereof in case the contractor shall fail in the judgment of the contracting officer, to make reasonable and satisfactory progress after such waiver of the time limit.

Article 6. If, at any time during the life of this contract, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve a material change in the character or quantity of labor or material to be furnished, or in any other provision of the contract, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor, or the other provisions thus substituted for those named in the original contract, and before taking effect must be approved

by the Secretary of War: Provided, that no payments shall be made in accordance with such supplemental or modified agreement unless the same was signed and approved before the obligation arising from such modification was incurred.

Article 7. No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

Article 8. The contractor shall be responsible for and pay all liabilities for labor and material in the prosecution of the work.

29 Article 9. Until final inspection and acceptance of any payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

Article 10. The contractor shall hold and save the United States, and all officers and agents thereof, harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

Article 11. Payments shall be made to the contractor as prescribed in Article 1 of this agreement, and in paragraph seventeen of the attached specifications.

Article 12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any breach of this contract by the contractor are reserved to the United States.

Article 13. No Member of or Delegate to Congress, or Resident Commissioner, nor any person belonging to or employed in the military service of the United States, is or shall be, admitted to any share or part of this contract, or to any benefit which may arise herefrom; but, under the provisions of section 116 of the act of congress approved March 4, 1909 (35 Stats., 1109) this stipulation, so far as it relates to Members of or Delegates to Congress or Resident Commissioners, shall not extend, or be construed to extend, to any contract made with an incorporated company for its general benefit.

30 Article 14. The term "contracting officer," wherever used in this contract, shall include the duly appointed successor of such officer.

Article 15. In the performance of this contract, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by Courts of the several States, Territories, or municipalities having criminal jurisdiction, is prohibited.

Article 16. No laborer or mechanic employed by the contractor or by any sub-contractor on the work herein specified, and no person employed to perform services similar to those of laborers and mechanics while directly operating dredging or rock excavating machinery or tools on the work herein specified, shall be permitted or required to work more than eight hours in any one calendar day except in case of extraordinary emergency.

Article 17. Subject to the conditions enumerated in section 2 of the eight-hour law of June 19, 1912, no laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any sub-contractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work. For each violation of this provision a penalty of five dollars shall be imposed for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work, and the amount of any such penalties shall be withheld for the use and benefit of the United States from any moneys becoming due under this contract, whether the violation of this provision is by the contractor or any sub-contractor.

Article 18. This contract shall be subject to the approval
31 of the Chief of Engineers, U. S. Army; and such approval, when given, shall relate back to, and be operative from, the date of the execution of the contract.

In witness whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written.

Witnesses:

GEO. F. KINSLEY

as to G. P. HOWELL,
Major, Corps of Engineers.

L. G. WILSON

as to HILLSBORO DREDGING CO.
By W. H. CALDWELL,
Sec. & Treas.

(Executed in Triplicate.)

Approved June 19, 1914.

DAN C. KINGMAN,
Chief of Engineers, U. S. Army.

32 II. *General Traverse.*

No demurrer, plea, answer, counterclaim, setoff, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On February 3, 1920, this case was argued and submitted by Mr. M. Walton Hendry, for the claimant, and by Mr. George T. Stormont, for the defendants.

33 IV. *Findings of Fact, Conclusion of Law, Opinion of the Court by Campbell, Ch. J., Concurred in by Judges Graham and Downey, and Dissenting Opinion by Judge Hay, Concurred in by Judge Booth.*

Entered March 8, 1920.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff is the duly appointed trustee of the Hillsboro Dredging Co., bankrupt, which company at the time of the transactions involved in this cause was a corporation engaged in dredging operations, having its principal place of business at Tampa, Fla.

II.

By an act of Congress approved July 25, 1912, appropriating certain sums of money "to be expended under the direction of the Secretary of War, and the supervision of the Chief of Engineers, for the construction, completion, repair, and preservation of the public works hereinafter named," the following appropriation was made:

"Improving channel from Clearwater Harbor through Boca Ceiga Bay to Tampa Bay, Florida; completing improvement and maintenance, twenty thousand dollars."

III.

On January 21, 1913, the Hillsboro Dredging Co. entered into a written contract with Capt. J. R. Slatterly, Corps of Engineers, acting on behalf of the United States, by which contract the said dredging company agreed to furnish the necessary plant, labor, and material for the work of dredging and rock removal in the channel from

Clearwater Harbor to Tampa Bay, the said company to receive 15½ cents per cubic yard for material dredged from certain sections of the work and $1.65 per cubic yard for material dredged from certain other sections of the work. It was also provided in the specifications which were a part of the contract that: "Within the limits of available funds the United States reserves the right to re-
34 quire the removal of such yardage as will complete the work described in paragraphs 17 and 19, be it more or less than the quantities above estimated, and final payment will not be made until the work is so completed." This contract was approved by the Chief of Engineers, United States Army, on February 21, 1913. A copy of the contract is attached to the petition marked "Exhibit A," and is made a part of this finding by reference.

Subsequent to the execution of this contract and by the rivers and harbors act of March 4, 1913, 37 Stat. 801, 809, Congress appropriated as follows:

"Improving channel from Clearwater Harbor through Boca Ceiga Bay to Tampa Bay, Florida: For maintenance, $3,000.00."

IV.

Work under the contract was begun in June, 1913, and continued until May 15, 1914, on which day the work under the contract ceased by order of the United States engineer officer in charge thereof. Payments for the work done by the contractor were made monthly, based upon estimates of the material dredged. These estimates were prepared three times a month by a Government inspector from the soundings made before and after dredging. These estimates so made were relied upon both by the contractor and the defendants. Through mistake the inspector in submitting the estimates made the quantities removed much less than the amounts actually removed. When the financial statement for April was made up in the district engineer's office at Jacksonville it was observed that the funds available for this work were becoming reduced to a point where it was necessary to exercise somewhat closer oversight to avoid overrunning the appropriation, and accordingly, on May 11, the inspector on the work was informed of the amount still available for payment to the contractor and was cautioned to stop the work before earnings of the contractor exceeded this sum. In reply on May 14 the inspector advised the engineer officer in charge of the work that his records showed that work had already been done to an amount in excess of what the available funds would pay for. The inspector was then instructed to stop the work and work ceased at midnight of May 15, 1914, and this contractor had no further connection with this work.

Upon an accurate computation of the work done it was determined that the contractor had removed 17,604.3 cubic yards of material from the areas for which he was to be paid at the rate of 15½ cents per cubic yard, amounting to $2,728.67, and 13,517.36 cubic yards from the areas for which he was to be paid at the rate of $1.65 per cubic yard, $22,303.64, a total of 31,121.39 cubic yards amounting at contract price to $25,032.31.

The contractor had been paid $15,240.32 and was charged with expenses of inspection during an extension of time beyond the contract period amounting to $722.47, leaving unpaid $9,069.52.

Predicated on the fact that 2,648 cubic yards of the materials removed consisted of silting in portions of the channel to which the price of $1.65 per cubic yard applied under this contract and which portions had theretofore been partially dredged under a former contract, and that this amount of silting had occurred after the completion of work under the former contract and before the
35 making of soundings preliminary to this contract, the engineer officer construed the appropriation of $3,000 made by the act of March 4, 1913, for maintenance, as available for the purpose of payment for work done under this contract. There was charged against the appropriation for superintendence and office expenses $1,732.90, which added to the amount paid the contractor, $15,240.32, made a charge against the appropriation of $16,973.22 and left available of the combined appropriations $6,026.78, which applied on the total amount of work done computed at contract prices left a balance of $3,042.74.

The contractor had also before May 15, 1914, blasted 1,551 cubic yards of rock in said channel, which it did not remove because of the fact that before it could remove it it was ordered by the defendants to cease work. The reasonable cost to the contractor of blasting said rock was $1 per cubic yard, in all, the sum of $1,551.

V.

By the act of Congress approved October 2, 1914, 38 Stat. 725, the sum of $20,000,000 was appropriated to be immediately available, and "to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers for the presrvation and maintnance of existing river and harbor works, and for the prosecution of such projects heretofore authorized as may be most desirable in the interests of commerce and navigation." Out of the sum so appropriated the Secretary of War, on the recommendation of the Chief of Engineers, allotted the sum of $12,000 for the completion of the work of improving the channel described in Finding II, and which was the channel which the contractor agreed in his contract herein set out above to dredge. In November, 1914, the contractor submitted to the engineer officer in charge of the work a voucher for the dredging of $1,846.33 cubic yards of material, at $1.65 per yard, amounting to $3,046.44, being the amount of material removed up to May 15, 1914, and not then accepted and paid for and being intended to cover the same unpaid balance shown in Finding IV. The amount of yardage stated in the voucher was in accordance with the engineer officer's statement as to the amount of yardage unpaid for and, so far as appears, the minor discrepancy between the amount stated in the voucher and the amount of unpaid balance shown in Finding IV was a mere matter of erroneous calculation in one or the other. The amount of this voucher was paid to the contractor by the district engineer officer in November, 1914, and with the balance of

the allotment of $12,000, the channel was completed by the United States.

VI.

When the district engineer, Maj. W. B. Ladue, settled his accounts, the Auditor for the War Department disallowed this payment of $3,046.44 which the said officer had paid to the contractor. The decision of the Auditor for the War Department was sustained by the Comptroller of the Treasury. As a consequence of this decision the engineer officer was refused credit for this amount in the settlement of his accounts as to the disbursement of accountable funds advanced to him. Maj. Ladue thereupon demanded of the Hillsboro Dredging Co. a refunding of this amount and, being advised by its at-
36 torney that it might be recovered, it consented that deduction should from time to time be made from the vouchers issued to it on account of dredging work it was then doing in the Waccamaw River, North and South Carolina, under another contract and the full sum of $3,046.44 was thus deducted. The dredging company, however, entered a protest, in form not shown, on the vouchers from which the deductions were made.

Conclusion of Law.

Upon the foregoing findings of fact, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and his petition is therefore dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record of this cause, the amount thereof to be entered by the chief clerk and collected by him according to law.

Opinion.

CAMPBELL, *Chief Justice,* delivered the opinion of the court:

In the act of July 25, 1912, 37 Stats., 201, 209, being what is called the rivers and harbors act, there is, among other provisions occurring therein, the following:

"Improving channel from Clearwater Harbor through Boca Ceiga Bay to Tampa Bay, Florida: Completing improvement and for maintenance, $20,000."

Under date of January 21, 1913, the Hillsboro Dredging Co. entered into a contract with Capt. Slattery, of the Corps of Engineers, United States Army, representing the Government, a copy of which is attached to the petition.

The contract provides that the contractor shall furnish the necessary plant, labor, and material required for a vigorous prosecution of the work of dredging and rock removal in channel from Clearwater Harbor to Tampa Bay, Fla., and do the work at the localities set

forth and in the manner described in the specifications, which were made a part of the contract.

Payment was to be made to the contractor at the following rates:

For dredging in Sections II and J, 15½ cents per cubic yard.

For dredging in Sections K, L, M, and P, $1.65 per cubic yard.

In the detailed specifications (section 17), the quantities in the different sections were estimated, and in section 32 it is said:

"The total estimated quantity of material to be removed to complete the work to be done as stated in paragraph 17 is 12,900 cubic yards, place measurement in Sections II and J, and 10,144 cubic yards, place measurement, in Sections K, L, M, and P, of which latter amount, 5,239 cubic yards, is ledge rock. These amounts will be used as a basis in canvassing bids. Within the limits of available funds the United States reserves the right to require the removal of such yardage as will complete the work described in paragraphs 17 and 19 be it more or less than the quantity above estimated, and final payment will not be made until the work is so completed."

The dredging company did work which, at the unit price mentioned in the contract, exceeded the amount of the appropria-
37 tion mentioned, and also an additional appropriation of $3,000 made for maintenance by the act of March 3, 1913, 37 Stats., 809. In other words, according to the findings of fact, the contractor removed a total of 31,121.39 cubic yards, amounting, at the contract price, to $25,032.31. A part of the appropriation was used for superintendence and office expenses, and the balance of the two appropriations was paid to the contractor. That left a balance of $3,046.44, for which suit is brought.

It is true that the contractor was subsequently paid the sum of $3,046.44. The circumstances of this last payment are shown by the findings to be that Congress made a lump-sum appropriation for rivers and harbors work, to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers, 38 Stat., 725, and out of this lump-sum appropriation, $12,000 was allotted by the Secretary upon the recommendation of the Chief of Engineers to the work of Clearwater Harbor.

The contractor in whose interest this suit is brought had no connection with the work to be done under this allotment, his connection with the work having ceased at the time his operations were suspended, as stated. Out of this subsequent appropriation and allotment the contractor was paid sum of $3,046.44. This payment being held to have been improperly made from that fund, and demand having been made on the contractor for its refund, the amount of it was, with the consent of the contractor, although he also entered a formal protest, deducted from what was due him under a different contract, having no connection with the work in question, thus leaving the situation as if he had not been paid at all the sum for which suit is brought.

Whether he can recover or not depends upon the right of the parties to contract for the doing of the work in question in excess of the amount or amounts appropriated therefor by the acts of Congress.

As above stated, the first appropriation is for "completing im-

provement and for maintenance." By a subsequent provision in the act (section 8) the Secretary of War, in his discretion, on the recommendation of the Chief of Engineers, is authorized to apply the funds appropriated for the completion of a specific work "to the prosecution of such work," in the event the appropriation shall prove insufficient for its completion. This provision is plainly intended to enable the officers to prosecute the work, to the extent of the appropriation, which might not be sufficient to enable them to have it completed, and without this provision the right to contract would be limited to a completed improvement. 4 Op. Atty. Gen., 600.

Section 3732, 3733, and 3679, Revised Statutes, may be read together in this connection. The object of their enactment was to prevent executive officers from involving the Government in liabilities beyond those authorized by Congress. 21 Op. Atty. Gen., 248.

It is provided by Sections 3732 and 3733 as follows:

"Sec. 3732. No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.

38 "Sec. 3733. No contract shall be entered into for the erection, repair, furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

A provision in the act of June 30, 1906, Chap. 3914, Sec. 9, 34 Stats., 764, is as follows:

"No act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed."

In making a contract, authorized by the act of 1912, the parties must be held to have had notice of the law under which they contracted. Its terms, as well as its limitations, are to be read into the contract. The language of Judge Richardson in McCollum's Case, 17 C. Cls., 92, 103, is apposite:

"In every contract, by lease or otherwise, with any public officer all laws applicable to such contract, as to its extent, operation, and the authority for making it, must be considered as stamped thereon and as forming part of the same."

See also Sanger & Moody Case, 40 C. Cls., 47; San Francisco Bridge Company Case, 209 Fed., 135.

In addition, however, to this rule of law, the contract, in the in-

stant case, carried, on its face, notice to the contractor that the work was not to exceed the limits of the appropriation. This appears from section 32 above quoted, the language being "within the limits of available funds," etc.

Unquestionably, where there is a liability on the part of the Government, the failure of Congress to appropriate for its payment does not avoid or discharge the obligation. This has been repeatedly recognized by this court. Collins Case, 15 C. Cls., 22, 35.

"But where an alleged liability rests wholly upon the authority of an appropriation they must stand and fall together so that when the latter is exceeded, the former is at an end, to be revived, if at all, only by subsequent legislation by Congress." Shipman's Case, 18 C. Cls., 138, 147.

In the rivers and harbors act there are a large number of items, some calling for maintenance, others for continuing improvement, and some for completing improvement, and others making special provisions. When Congress made an appropriation for completing the work, followed by a provision that the work could be prosecuted to the extent of the appropriation, in case its completion could not be secured, it is plain that the authority to contract was intended to be limited. Unless the appropriation limited the right of the officer to charge the Government, it is difficult to see why the amount should be stated; and it is not to be presumed that in an act carrying hundreds of items, such as a rivers and harbors act, Congress intended to leave it to the discretion of the officers, or the judgment of contractors, to determine whether more work should be done
39 than there was money to pay for, or to impose liabilities upon the Government beyond the amounts appropriated.

"Were such statutory provisions to be disregarded, and were judgment to be given whenever a claimant shall prove that he has done work or rendered service under the direction of an executive officer, it would enable the executive branch of the Government, with the aid of this court, to annul a law of Congress, and to throw down any limitation which Congress might impose upon the cost of our public works." Per Judge Nott, Curtis v. United States, 2 C. Cls., 144, 152.

There was no specific authority granted by Congress to make a contract involving an amount beyond that appropriated, and therefore to say that the contract was one authorized by law would not fully express the fact, because what was authorized was a contract for completing the work within a definitely stated appropriation, or a contract for prosecuting the work to the extent the appropriation would allow. This must have been the intention of the act, because Congress not only carefully limited the sum to be expended for completing the improvement and maintenance, but it deemed it necessary to make special provision for prosecuting the work in the event a contract to complete it was not feasible. The latter provision is entirely superfluous if the parties could bind the Government without it.

The act of 1906 may be considered in this connection as containing at least a legislative interpretation of the acts making appropriations for public works.

We have not overlooked a separate claim for $1,551.00, for certain blasting, but what has been said of the larger item applies to this claim also.

Our conclusion is that the plaintiff is not entitled to be paid for work done in excess of the authorized appropriation and that his petition should be dismissed. San Francisco Bridge Company v. United States, 209 Fed., 135.

And it is so ordered.

Graham, Judge, and Downey, Judge, concur.

Dissenting Opinion.

HAY, *Judge,* dissenting:

I can not concur in the opinion of the court.

Section 3732 of the Revised Statutes is as follows: "No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is made under an appropriation adequate to its fulfillment."

Section 3733 of the Revised Statutes provides: "No contract shall be entered into for the erection, repair, or furnishing any public building, or for any public improvement, which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

The defendant claims that by virtue of the sections of the Revised Statutes quoted above there is no liability upon the United States to pay the contractor a larger sum of money than the amount
40 appropriated for the completion of the work on the channel.

The contract made on behalf of the United States in this case was authorized by law, to wit, by the act approved July 25, 1912. On its face and by its terms the appropriation was adequate to its fulfillment, as it only contemplated the expenditure of $19,806.10, a sum within the amount appropriated. If in the progress of the work the funds available for the performance of the contract did not hold out, that fact can not be held to have avoided the contract and to have released the United States from an obligation incurred under a contract authorized by law. The work was under the control of the officers of the Government, as were the funds available for the work. The contractor, by its contract, was compelled to rely upon the inspection made by the officer of the Government who was put in charge of the work for the very purpose of ascertaining the quantity of material dredged. If a mistake was made by the inspector that can not furnish the Government with an excuse to repudiate an obligation incurred under a contract which was authorized by law. The work was stopped because the appropriation was exhausted. This justified the officer in his action, but it does not release the obligation of the United States to pay for the work done under a contract authorized by law to be entered

into. A contractor is not chargeable with knowledge of the administration of an appropriation, nor can his legal rights be impaired by the failure of the officer in charge to properly administer the available funds. "An appropriation per se merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts nor cancel its obligations nor defeat the rights of other parties." Chief Justice Nott, Ferris v. United States, 27 C. Cls., 542, 546.

The contract was made by an officer of the United States authorized by law to make such contracts. Nothing is wanting to make it a valid contract binding on both parties. The quantity of work to be done was specifically set out in the contract; the contract was approved by the Chief of Engineers, under whose supervision, by the terms of the statute, the money was to be expended; the work performed was accepted by the Government; it inured to the benefit of the Government; and had it not been done the work would not have been completed within the amount of the appropriations made for its completion. If more work was done under the contract than the appropriation would pay for, can the United States get the benefit of it, enjoy it for all time, and refuse to pay for it? To answer this question in the affirmative would be to perpetrate a gross wrong upon the contractor, who would be made the victim of the mistakes of the Government's officers under whose direction the work was being performed.

The act making the appropriation and providing for the work which was performed under the contract did not in terms limit the cost of the work, but provided for the work and then made an appropriation which turned out to be inadequate to do the whole work. The authority to cause the work to be done and to make a contract for its performance was complete. The work was authorized by Congress to be done and the authority to complete it authorized a contract to be made for its completion, notwithstanding the fact that the amount appropriated was not sufficient for its completion.

41 It is a case in which the authority to cause the work to be done and to make contracts therefor is complete and unrestricted. All work, therefore, done under the direction of the officers thus charged with the execution of the law creates a liability on the part of the Government to pay for it, and if a written contract be made and work be done in excess of the contract specifications, or entirely outside of or in addition to the written contract, and such work inures to the benefit of the United States, in the execution of the law, or is accepted by the proper public officers, a promise to pay its reasonable value is implied and enforced. Spilman v. United States, 18 C. Cls., 138, 146; Collins v. United States, 15 C. Cls., 35.

That this was the intention of Congress is borne out by the language of the statute itself. Among other things the statute provides: "That the Government shall not be deemed to have entered upon any project for the improvement of any waterway or harbor

mentioned in this act until funds for the commencement of the proposed work shall have been actually appropriated by law" (37 Stat., 223). And further: "And whenever the appropriations made, or authorized to be made, for the completion of any river and harbor work shall prove insufficient therefor, the Secretary of War may, in his discretion, on the recommendation of the Chief of Engineers, apply the funds so appropriated or authorized to the prosecution of such work" (37 Stat., 233). The work in question was first authorized to be surveyed by the act approved March 2, 1907 (35 Stat., 1112). The first appropriation made for improving this work was made in the act approved June 25, 1910 (36 Stat., 644) The appropriation for the completion of the improvement of this work was made in the act approved February 27, 1911 (36 Stat., 941). Again, in the act approved July 25, 1912 (37 Stat., 209), the appropriation with which we are now concerned was made for the completion of the work. Taking the two provisions above quoted together, it is manifest that the work now under consideration had been entered upon, and having been entered upon, the Secretary of War was authorized to enter into a contract for the completion of the work, even though the appropriation made was not sufficient to complete it. Therefore the insufficiency of the appropriation can not be held to defeat the rights of the contractor nor to cancel the obligations of the Government.

When the appropriation of $12,000 was made for the completion of the channel the officer in charge paid to the contractor the sum of $3,046.44 out of said $12,000, which the contractor had earned under his contract. This sum so paid to the contractor was charged to the officer in the settlement of his accounts by the Auditor for the War Department, and upon an appeal to the Comptroller of the Treasury the decision of the auditor was affirmed. Afterwards this sum was deducted from what was due the contractor upon another contract, having no relation to the subject matter of the contract for the completion of the Clearwater Channel in Florida. This deduction was made over the protest of the contractor and was made at the request of the officer, who, by the decision of the auditor, was in debt to that amount to the United States. The money so taken from the contractor was acquired by the United States without consideration, and the Government is now resisting the payment of money which in equity and good conscience it ought not to retain. It is
42 not denied that the contractor was entitled to the money which it earned under the second contract. This particular sum of money, to wit, $3,046.44, rightfully due the contractor under its contract, is held for the purpose of saving harmless an officer who is alleged to have wrongfully paid the said sum under another contract. There had been a settlement in full under the first contract, and there was no authority under the circumstances to deduct this amount from what was due the contractor under the second contract.

In the case of the San Francisco Bridge Co. v. United States, 209 Fed. 135, cited in the opinion of the court, it is to be observed that the contractor was notified by letter that the available funds would permit the excavation of only a certain number of cubic yards. In

the face of that notice the contractor excavated 35,000 cubic yards more than the available funds would pay for. In that case the opinion of the court turns upon the question of notice. The court said: "It is true that plaintiff could not knowingly overrun the appropriation and bind the Government. But it is equally true that it was entitled to rely upon the statements of the officers in charge, who kept the accounts and should know the amount still available to be applied to the work on hand." In this case no notice was given, and it was not until the excess work had been done that the contractor was informed by the officers that it had dredged more material than the available funds would pay for. In the Curtis case, also cited in the opinion of the court, the amount to be expended was named in the contract, and the limit of cost for the building was specifically set out in the statute.

In the very nature of things, river and harbor work is continuing work; appropriations for the completion of such work are rarely adequate, and it is to be observed that in river and harbor acts no limit of cost is fixed, as is the case in public buildings acts, where without exception a limit of cost is fixed.

I am authorized to say that Judge Booth concurs in this dissenting opinion.

43 V. *Judgment of the Court.*

At a court of Claims held in the City of Washington on the Eighth day of March, A. D., 1920, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants and do order, adjudge and decree that the claimant, as aforesaid, is not entitled to recover any sum in this action of and from the United States, and that the petition herein be and it hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the claimant, as aforesaid, the sum of Seventy-four Dollars and thirty-one cents ($74.31), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VI. *Claimant's Application for and Allowance of an Appeal.*

From the judgment rendered in the above-entitled cause on the eighth day of March, 1920, in favor of the defendants, the claimant by his attorney on the nineteenth day of April, 1920, makes application for, and files notice of an appeal to the Supreme Court of the United States.

M. WALTON HENDRY,
Attorney of Record for Claimant.

Filed April 19, 1920.

Ordered: That the above application for appeal be allowed as prayed for. April 19, 1920.

By THE COURT.

44

Court of Claims.

No. 33983.

JOHN B. SUTTON, Trustee of the Estate of Hillsboro Dredging Company, a Corporation, Bankrupt,

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law and opinion of the court by Campbell, Ch. J., and of the dissenting opinion by Hay, J.; of the judgment of the court; of the application of the claimant for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City, this Twentieth day of April, A. D., 1920.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 27,625. Court of Claims. Term No. 870. John B. Sutton, trustee of the estate of Hillsboro Dredging Company, bankrupt, appellant, vs. The United States. Filed April 22d, 1920. File No. 27,625.

Supreme Court of the United States.

OCTOBER TERM, 1919.

JOHN B. SUTTON, Trustee of the Estate of Hillsboro Dredging Company, Bankrupt, *Appellant*,
vs.
THE UNITED STATES.
No. 870.

APPEAL FROM THE COURT OF CLAIMS.

TABLE OF CONTENTS.

I. Statement of the Case 2
II. Assignment of Errors 3
III. Brief of Argument 4
4 Op. Atty. Gen. 600 7
Collins *vs.* United States, 18 Court of Claims, 138, 146 7, 8
Freedman's Bank *vs.* U. S. 16 C. C. 19, 29 . . . 7
Spillman *vs.* United States, 18 C. C. 138, 146 . . . 8
Grant *vs.* U. S. 5 C. C. 71, 72, 85 and 86 8
Ferris *vs.* U. S. 27 C. C. 542 11
Parsons *vs.* U. S. 15 C. C. 22 11
Spofford *vs.* U. S. 32 C. C. 45 11
Miller *vs.* Schloss, 218 N. Y. 400, 407, 113 N.E. 337 12
Brown's Legal Maxims, 222 13
Elliott *vs.* Swartout, 10 Pet. 137 13
United States *vs.* Corliss Steam Engine Co. 91 U. S. 321 13
Griffith *vs.* United States, 22 C. Cls. 165 13
United States *vs.* Freeman, 3 How., 564 13
Arthur *vs.* United States, 16 C. Cls. 422 13

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

JOHN B. SUTTON, Trustee of the Estate of Hillsboro Dredging Company, Bankrupt, *Appellant*,
vs.
THE UNITED STATES.
} No. 870.

APPEAL FROM THE COURT OF CLAIMS.

I. STATEMENT OF THE CASE.

This is a suit brought in the Court of Claims arising out of a contract for dredging in the channel between Clear Water Harbor and Tampa Bay, Florida.

The contract proper and specifications are contained in the record pages 3 to 14.

The Court found the facts to be in regard to the two different items of claim set up in the petition in findings 1 to 6, inclusive.

1. Appellant dredged 1,844.09 cubic yards which at contract rates amounted to $3,042.74 for which payment was made to appellant by the defendant and afterwards deducted over appellant's protest from money due appellant under a contract for dredging in the Wacamaw River, North and South Carolina and appellant also blasted out 1,551 cubic yards of rock within the area covered by the said Clear Water Harbor Contract, reasonably worth $1,551.00 for which no payment has ever

been made. There was and is no controversy as to the performance, or as to the amount due under the said Wacamaw River contract and the lower court dismissed this suit on the ground alone that there was no proper appropriation out of which to pay the appellants for the work so performed. These facts are shown by findings 2 to 6, inclusive.

The two items thus set up in the petition and dismissed by the Court of Claims were as follows:

1. Dredging 1,844.09 cubic yards in that area covered by the contract to which the price of $1.65 per cubic yard is applicable paid to appellants, but afterwards deducted over appellant's protest from moneys due appellants under said contract for dredging in the Wacamaw River, North and South Carolina	$3,042.74
2. Blasting 1,551 cubic yarls of rock in the said channel reasonably worth	1,551.00
Total	$4,593.74

The court entered judgment against appellants. The appellants appealed to this Court.

II. ASSIGNMENT OF ERRORS.

The appellant assigns the following errors in the conclusion of law and judgment of the Court of Claims:

1. In refusing to allow for dredging 1,844.09 cubic yards of material and removing same from that portion of the channel covered by the contract to which the price of $1.65 per cubic yard applied under said contract amounting to $3,042.74.

2. In refusing to allow for blasting 1,551 cubic yards of rock within the area of said channel covered by said contract reasonably worth $1,551.00.

3. In refusing to enter judgment in favor of the appellant for $4,593.74, and in entering judgment in favor of the defendant.

III. BRIEF OF ARGUMENT.

1. Removal of 1,844.09 cubic yards of material from that portion of the channel to which the contract price of $1.65 per cubic yard is applicable.

The essential findings on this item are found in the excerpt from the Act of Congress approved July 25, 1912, quoted in findings two, reading as follows:

"Improving channel from Clear Water Harbor through Boca Ceiga Bay to Tampa Bay, Florida; completing improvement and maintenance, twenty thousand dollars."

and in the following excerpt from findings four:

"These estimates were prepared three times a month by a Government Inspector from the soundings made before and after dredging. These estimates so made were relied upon both by the contractor and the defendants. Through mistake the inspector in submitting the estimates made the quantities removed much less than the amounts actually removed. When the financial statement for April was made up in the District Engineer's office at Jacksonville, it was observed that the funds available for this work were becoming reduced to a point where it was necessary to exercise somewhat closer oversight to avoid overrunning the appropriation, and accordingly, on May 11, the inspector on the work was informed of the amount still available for payment to the contractor and was cautioned to stop the work before earnings of the contractor exceeded this sum. In reply on May 14 the inspector advised the engineer officer in charge of the work that his records showed that work had already been done to an amount in excess of what the available funds would pay for."

The decision of the Court is predicated upon Sections 3732 and 3733 of the Revised Statutes reading as follows:

"No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is made under an appropriation adequate to its fulfillment. No contract shall be entered into for the erection, repair, or furnishing any public building, or for any public improvement, which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

The lower court contends that the contract in this case is in violation of the said sections of the Revised Statutes in that the amount of material actually dredged at contract rates, was in excess of the lump sum appropriated for completing the work and that therefore, the said dredging and blasting cannot be paid for notwithstanding the fact that the work inured to the benefit of the defendant.

The act under which the appropriation was made for the work in question in this case (37 Stat., 223) further provides:

"That the Government shall not be deemed to have entered upon any project for the improvement of any waterway or harbor mentioned in this act until funds for the commencement of the proposed work shall have been actually appropriated by law." And further: "And whenever the appropriations made, or authorized to be made, for the completion of any river and harbor work shall prove insufficient therefor, the Secretary of War may, in his discretion, on the recommendation of the Chief of Engineers, apply the funds so appropriated or authorized to the prosecution of such work."

Further (37 Stat., 222), provides:

"All work of improvement herein or hereafter authorized to be prosecuted or completed under contracts may in the discretion of the Secretary of War be carried on by contract or otherwise, as may be most economical or advantageous to the United States."

The work in question was first authorized to be surveyed by the act approved March 2, 1907 (35 Stat., 1112). The first appropriation made for improving this work was made in the act approved June 25, 1910 (36 Stat., 644). The appropriation for the completion of this work was made in the Act approved February 27, 1911 (36 Stat., 941). Again, in the act approved July 25, 1912 (37 Stat., 209), the appropriation in question was made for the completion of this work.

Considering the last three provisions above quoted it is manifest, first, that the work under consideration had been entered upon by the defendant and, therefore, as it had been entered upon and the Secretary of War was authorized to proceed with the work, and under the last provision quoted the Secretary of War is specifically authorized to carry on the work "by contract or otherwise, as may be most economical or advantageous to the United States," the Secretary of War was authorized to enter into a contract for proceeding with the work in question and for its completion even though the appropriation turned out to be insufficient to complete it.

On its face and by its terms the appropriation was adequate to its fulfillment as the said contract only contemplated the expenditure at contract rates, considering the quantity of material to be dredged as set forth in Section 17 of the specifications attached to said contract (record, page 10) an expenditure of $19,806.10, a sum within the amount appropriated. The contract was made by an officer of the United States authorized by law to make

such contracts, and it has been shown that the Secretary of War was authorized to enter into a contract for said work so that there is absolutely nothing lacking to make said contract a valid contract "authorized by law" and binding upon both parties.

Therefore, as the said contract was executed according to law and was "authorized by law" as provided for in Section 3732 of the Revised Statutes, it is immaterial that the appropriation proved to be inadequate to complete the work, for said Section 3732 is in the alternative. The defendant, therefore, cannot escape liability for any obligation incurred under said contract and for which it received the benefit at plaintiff's expense, notwithstanding the fact that the appropriation for completing the work turned out to be inadequate (4 Op. Atty. Gen., 600; Collins vs. United States, 18 Ct. Cls., 138, 146).

The act making the appropriation providing for the work which was performed under the contract did not in its terms limit the cost of the work, but first provided for the work or authorized the work and then made an appropriation for doing the work which turned out to be inadequate to do the whole work. "In a word, this is a naked case of an inadequate appropriation as to which it has been again and again held that it affects no legal right." (Freedman's Bank vs. U. S., 16 C. C., 19, 29.)

Therefore, the authority to cause the work to be done and to make a contract for its performance was complete. The work was authorized by Congress to be done and the authority to complete it, authorized a contract to be made for its performance notwithstanding the fact that the amount appropriated was not sufficient for its completion. It is submitted, therefore, that this is a case where the authority to cause the work to be done and to make contract therefor is complete so that all work done under the

direction of the officers thus charged with the execution of the law and of the contract creates a liability on the part of the defendant to pay for the work done and if work is so done under written contract made or "authorized by law" to be made, in excess of the contract specifications or entirely outside of, or in addition to the written contract, and such work inures to the benefit of the United States, or is accepted by the proper public officers, a promise to pay its reasonable value is implied and enforced, notwithstanding the fact that the appropriation turns out to be inadequate to pay for same. Spillman vs. United States, 18 C. Cls., 138, 146; Collins vs. United States, 15 C. Cls., 35.

As far back as 1869 almost the identical question involved in this case was decided by the Court of Claims in the case of Grant vs. United States, 5 Ct. Cls., 71, 72, 85 and 86. In this case the Statute provided an appropriation for the completion of a United States post office and a contract was entered into for a less amount than the appropriation in question. During the progress of the work the agents of the Government desired changes made in the contract which increased the cost of the building to an amount in excess of the appropriation, which changes made a better building than was originally contracted for and inured to the benefit of the defendant. Inasmuch, however, as the contract as made was "authorized by law," the mere fact that in the performance of the contract the appropriation was exceeded by changes made under the direction of proper Government officers, all of which inured to the benefit of the defendant did not deprive the plaintiffs of their rights to recover for the work nor did it cancel the obligations of the Government to pay their fair value and the Court said, pages 85-86:

"And in no instance to my knowledge have we declined to give judgment for plaintiff when on grounds of quantum meruit he has shown himself clearly entitled to recover."

The appellant's case is very similar. The contract as made was "authorized by law" notwithstanding the fact that the appropriation in the prosecution of the work proved to be inadequate for completing it so that the said contract as made was not in violation of Section 3732 of the Revised Statutes.

Further, the work was under the control of the officers of the defendant as were the funds available for the work. The appellant relied upon the estimates made of the quantities removed as shown on the monthly statements of the defendant's inspector authorized to keep a record of the work being performed (Findings 4) and as a matter of fact, the appellant by the terms of the contract itself was compelled to rely upon the inspection made by the officer of the defendant who was in charge of the work for the very purpose of ascertaining the quantity of material dredged.

Article 2 of the said contract provides:

"All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as may not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and *quantity* shall be final." (Italics ours.)

DEFENDANT'S ESTIMATES OF WORK PERFORMED IN ERROR.

The defendant's inspector "through mistake in submitting the estimates made the quantities removed much less than the amount actually removed" (Finding 4). Yet,

notwithstanding the fact that the appellant by the very terms of the contract was compelled to rely upon the quantity estimated by the defendant's officers, the effect of the decision of the lower Court amounts to an award to the defendants of the contractor's work free of cost by reason of the defendant's own errors in reporting the quantities of material dredged as the work progressed. Such an award to the defendant for its own errors and permitting the defendant to enjoy the benefit of the appellant's work for all time and refusing to pay therefor would, in the language of the dissenting opinion in this case, "perpetrate a gross wrong on the contractor who would be made the victim of the mistakes of the Government officers under whose direction the work was being performed."

Aside, therefore, from the question of lack of appropriation, the appellant is entitled to recover the amount herein claimed as damages for the record clearly shows that the work in question in this case was performed solely because of the errors of the defendant whose estimates under the contract were final between the parties and upon which appellants had the right therefore to rely.

APPELLANT NOT CHARGEABLE WITH CONSTRUCTIVE KNOWLEDGE.

The record in this case further shows that out of the lump sum appropriated, the defendants used the sum of $1,732.90 for superintendents and office expenses in carrying out this work thereby reducing the amount of the appropriation by that amount for which the appellant would under any circumstances be entitled to payment (Finding 4, Record, page 22). Therefore, as the appellant is not charged with knowledge of the amount of funds to be used out of the appropriation by the de-

fendant, the appellant cannot be charged with knowledge of the amount available for performing the work and as the defendant by its own officers, whose estimates the appellants were compelled to rely upon by the terms of the contract, misled the appellants as to the amount of material dredged, it is difficult to see upon what theory the Court can hold that the appellant was chargeable with constructive knowledge of the amount of funds available.

Plainly the appellants are not charged with such knowledge and are not responsible for the defendant's errors and the defendant should not become unjustly enriched at the appellant's expense by reason thereof. Ferris vs. United States (27 C. C., 542).

As set forth in the dissenting opinion in this case, "an appropriation per se merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts nor cancel its obligations nor defeat the rights of other parties." Chief Justice Nott, Ferris vs. United States and Collins vs. United States, supra; Parsons vs. United States, 15 Court of Claims, 22; Spofford vs. United States, 32 Court of Claims, 45.

When the appropriation of $12,000 (38 Stat., 725) was made for the completion of the channel in question, the officer in charge paid to the appellant the said sum of $3,046.44 out of the said $12,000.00 which the appellant had earned under said contracts in excavating the said material (Finding 5). Inasmuch as the appellant had performed this work and it had inured to the benefit of the defendant and the said act provided: "That all works of improvements herein or hereafter authorized to be prosecuted * * * may be carried on by contract or otherwise," the said officer was not without authority to

pay for this work out of said appropriation notwithstanding the fact that the work had already been performed without entering into a contract for performing the same. The last mentioned appropriation was made to complete the work. so that as the work performed by appellant would have been required to have been performed and paid for out of said appropriation, had it not been performed by the appellants, the said work was accepted as a continuation of the work by the said officer and paid for accordingly, and this payment was made under the authority of said excerpt from 37 Stat., 222, above quoted, providing for completing the work by contract or *otherwise*. In other words, this provision of the Statute gave the officer the authority to complete the work in *any* manner and hence the work performed by the appellant was accepted and paid for as a part of the work for which the said $12,000.00 was appropriated.

Afterwards this sum so paid was deducted from the amount due the appellant under the said Wacamaw River contract, having no relation to the subject matter of the contract in question. This deduction was made over the protest of the appellant (Finding 6) and the money so taken was acquired by the defendant without consideration, and the defendant is now resisting the payment of the said money which in equity and good conscience it ought not to retain.

"A quasi or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another * * * when the acts of the parties or others have placed in the possession of any person, money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and which ex aequo et bono belongs to another." Miller vs. Schloss, 218 N. Y., 400, 407, 113 N. E., 337.

The books are full of authorities to the point that when such adjustments are made they will not be disturbed by the Courts, unless for fraud or mistake (Brown's Legal Maxims, 222; Elliott vs. Swartout, 10 Pet., 137; United States vs. Corliss Steam Engine Co., 91 U. S., 321; Griffith vs. United States, 32 C. Cls., 165; United States vs. Freeman, 3 How., 564; Arthur vs. United States, 16 C. Cls., 422.

What has been said herein in reference to the item of $3,042.74 is applicable also to the item of $1,551.00 for blasting except the fact that the said $3,042.74 has once been paid by the defendant to the plaintiff and retained from the amount due under another contract.

IV. CONCLUSION.

The judgment should be reversed and the cause remanded to the Court of Claims with directions to give judgment in favor of the appellant for the two items shown by the findings, amounting to $4,593.74.

M. WALTON HENDRY,
Attorney for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JOHN B. SUTTON, TRUSTEE OF THE ESTATE of Hillsboro Dredging Company, Bankrupt, Appellant,
v.
THE UNITED STATES.
No. 307.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a suit growing out of a contract to dredge a channel from Clear Water Harbor, Florida, to Tampa Bay, Florida. The contract was entered into between the Hillsboro Dredging Company and the War Department January 21, 1913. (R. p. 3.) Before the contract was entered into, that is, on July 25, 1912, Congress appropriated $20,000 for the purpose, and after the contract was executed, that is, on March 4, 1913, Congress appropriated $3,000 for maintenance. (Findings II and III, pp. 20-21.)

The contract was let on a unit-price basis—a stipulated amount per yard to be dredged, and

during the life of the contract the Government inspectors kept account of the yardage dredged. Owing to a mistake of the inspectors in keeping their accounts it was discovered on May 14, 1914, that the company had dredged more yardage than could be paid for by the two appropriations. Consequently, on May 15, 1914, the contracting officer stopped work on the contract. (Finding IV, p. 21.)

Later, on October 2, 1914, Congress appropriated $20,000,000 to be used under the direction of the Secretary of War for the preservation and maintenance of existing river and harbor work and for the prosecution of projects theretofore authorized. Out of this sum the Secretary of War allotted $12,000 to be used in completing this channel in question. In November, 1914, the contractor submitted a voucher for $3,046.44 for material dredged but not paid for as above set out, which sum was paid by the district engineer out of this last appropriation. (Finding V, p. 22.)

This payment was disallowed by the Auditor of the War Department and his action was approved by the Comptroller of the Treasury. An amount equal to the sum which had been paid was then withheld from the contractor from money due it under a contract which the company was performing on the Wacamaw River, North and South Carolina. (Finding VI, p. 23.) Also, before the contract was terminated, the contractor had blasted 1,551 cubic yards of rock at a reasonable cost of $1.00 per cubic yard, which was not dredged because of the termination of

the contract. Payment for this is claimed on a *quantum meruit* basis in addition to the excess yardage dredged. (Finding IV, p. 22.)

CONTENTIONS.

The appellant contends:

1. That the Chief of Engineers was authorized to enter into this contract and to complete the channel regardless of the appropriation.

2. That even if the contract was limited by the appropriation, an implied contract arose to pay for the benefit which inured to the United States.

3. That the United States could not reimburse itself for this overpayment out of moneys due appellant under another contract.

The Government maintains:

1. That Congress granted no authority to contract for work in excess of the appropriation, and that such work could not be paid for as contemplated by the contract.

2. That no recovery can be had on an implied contract where the officers of the Government had no authority to contract for the work and where the benefit, if any, could not be separated from the work done under the contract so as to impute an acceptance by the United States of the benefit.

3. That the United States had the right to withhold money due under the Wacamaw contract and offset the payment wrongfully made by the District Engineer for the dredging in excess of the appropriation as a payment made by mistake of fact and law.

BRIEF.

I.

Congress did not authorize the making of a contract covering more work than could be paid for by the appropriation; nor did the Chief of Engineers undertake to contract for work in excess of the appropriation.

The first question to be considered is whether, where an appropriation limits the amount to be expended on a given undertaking, the Government can be bound contractually to pay for work in excess of the appropriation in the absence of clear expression by Congress to that effect.

Section 3732 of the Revised Statutes provides:

> No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year. (Comp. Stat. 1916, sec. 6884).

Section 3733 of the Revised Statutes provides:

> No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose. (Comp. Stat. 1918, sec. 6886.)

It is elementary that these statutes are a part of and qualify every contract entered into with Government officers. If not expressly written in, they must be read into the contract by necessary implication.

> *Hooe* v. *United States*, 218 U. S. 322.
> *United States* v. *McMullen et al.*, 222 U. S. 460.

As Mr. Justice Holmes says in the *McMullen case*, p. 472:

> The contract estimated the amount of material to be removed, and as there were different prices per yard for earth and rock, this amount was expressly made subject to the appropriations, *as without expression would have been implied.* See Rev. Stat., sec. 3733.

The next question is whether in this case the appropriation act under which this work was done conferred any power to contract for work in excess of the amount appropriated; and then, whether the contract can be construed as contracting for more work than could be paid for.

The appropriation for this particular project is found in the rivers and harbors act of July 25, 1912. (Ch. 253, 37 Stats. 201, 209.)

> Improving channel from Clearwater Harbor through Boca Ceiga Bay to Tampa Bay, Florida: Completing improvement and for maintenance, twenty thousand dollars. (Finding II, R., p. 20.)

Section 8 of the same act provides (37 Stat., 233):

> * * * and whenever the appropriations made or authorized to be made *for the completion* of any river and harbor work shall *prove insufficient* therefor, the Secretary of War may, in his discretion, on the recommendation of the Chief of Engineers, apply the funds so appropriated or authorized to the *prosecution* of such work. (Italics ours.)

Reading these two paragraphs together, it is clear that the intention of Congress was to appropriate $20,000 to go as far as it would toward the completion of this project. No authority to contract in excess of the appropriation can be read into the act.

In construing the intention of Congress as shown by this appropriation, the act of June 30, 1906, is important. (Ch. 3914, sec. 9, act of June 30, 1906, 34 Stat. 697, 764.)

> No act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such Act shall in specific terms declare an appropriation to be made or that a contract may be executed.

Manifestly, the foregoing appropriation act does not specifically declare that a contract can be made to pay money in excess of the appropriation. Under this act the strictest construction must be applied to the appropriation act, and when that is done the authority of any Government officer to contract in

excess of the appropriation vanishes. As stated by Mr. Justice Clifford in *Bradley* v. *United States* (98 U. S. 104–113):

> Cases arise, as there stated [4 Op. Att. Gen. 600], where the authority to contract for the work is expressly given in the appropriation act, and in such cases it is clear, as there admitted, that the power to contract exists even though the price to be paid exceeds the amount appropriated. Examples of the kind are given in that opinion, to which many more might be added; but when no such authority is given, and nothing is contained in the act appropriating the money from which such an authority may be implied, it is clear that the head of the department can not involve the Government in an obligation to pay anything in excess of the appropriation.

From the foregoing, it necessarily follows, that the Chief of Engineers was limited in his authority to contract for the completion of this project by the amount of the appropriation. The contract was not for a lump sum, but the terms were that the contractor was to be paid a given amount for each cubic yard excavated. (R. p. 3.) If the authority to enter into this contract could be separated from the amount of the appropriation, it could be argued that the Chief of Engineers had authority to bind the Government perpetually, so long as the contractor dredged within the limits of these harbors and so long as the work was not finally completed. It is submitted that no authority was given to contract in excess of the amount appropriated.

Nor does the contract bear the construction that the Chief of Engineers attempted to contract in excess of the appropriation. (R. p. 3–14.)

The amount of material to be dredged was estimated by the contract. (R. p. 10.) The price bid was 15½ cents per cubic yard for Sections II and J; and $1.65 per cubic yard for Sections K, L, M, and P. (R. p. 3.) The material estimated to be dredged at the price bid would amount to less than the appropriation.

Paragraph 32 of the specifications (p. 13) provided:

> The total estimated quantity of material to be removed to complete the work to be done as stated in paragraph 17 is 12,900 cubic yards, place measurement in Sections II and J, and 10,144 cubic yards, place measurement, in Sections K, L, M, and P, of which latter amount 5,239 cubic yards is ledge rock. These amounts will be used as a basis in canvassing bids. *Within the limits of available funds* the United States reserves the right to require the removal of such yardage as will complete the work described in paragraphs 17 [Location, R. p. 9] and 19 [Work to be done, R. p. 10) be it more or less than the quantity above estimated, and final payment will not be made until the work is so completed.

There was no attempt, therefore, to contract in excess of the appropriation. The contractor had constructive knowledge of the amount of the appropriation and that the completion of the project depended upon the limits thereof.

If the contracting parties did not, by their contract, agree to the performance of more work than could be paid for by the appropriation, or if, as we contend, the authority to contract was limited by law to the extent of the appropriation, it is clear that no liability or obligation could arise out of the contract to pay for this extra work. If limited by law, the contract was a nullity so far as it attempted to exceed the appropriation and there could be no liability growing out of it to pay for the additional dredging. This case is distinguished from the cases cited by appellant, where a liability is expressly created by Congress, but with insufficient appropriations to extinguish the liability, or where the liability arises out of an implied or quasi contract based on an act of Congress or the Constitution where the Government has submitted itself to the jurisdiction of the Court of Claims.

It is also clear that if the contract was not authorized by law, so far as it exceeded the appropriation, the mistakes of the inspectors could add nothing to the legality of the contract. In fact, the contract does not disclose any terms whereby the contractor had any right to rely on the computations of the inspectors. If it did so, it was for its own convenience. The quantity and quality of the work was to be determined by the contracting officer, not the inspectors, and when it was so determined the quantity had exceeded the amount which could be paid. (R. p. 3, Art. 2.) But the contracting

44125—21—2

officer's authority extended only to the limits of the contract and his decision could not bind the Government beyond the liability imposed by the contract.

The argument of appellant that the company was not charged with constructive knowledge of the amount of the appropriation available for use under the contract is without merit because he was paid more than $20,000, the amount appropriated for the work by the act of July 25, 1912. (Finding IV, p. 22.) After the contract in question was executed on January 21, 1913, Congress passed the act of March 4, 1913, ch. 144, sec. 1 (37 Stat. 801–809), which appropriated $3,000 "for maintenance" of this project. Part of the work done under the contract of January 21, 1913, consisted of dredging material which had silted or filled in the channel, this channel having been completed to the required depth and width under a previous contract not here in question. The engineer accordingly construed this appropriation of March 4, 1913, as available for the payment of work done under this contract. (Finding IV, p. 22.) So, for the purposes of paying this contractor, the combined appropriations were used and the sum of $23,000 was available for the purpose. From this combined appropriation, the sum of $1,732.90 was deducted by the United States for office expenses and superintendence. As both appropriations mentioned "maintenance" as chargeable against the appropriations, appellant was charged with knowledge of the whole purpose of

the appropriation. The amount could have been determined with reasonable diligence. Besides, the company received more than $20,000, which was all that it could expect for the prosecution or completion of the work. The cases cited, where payments for different purposes are made from a general fund and where the Government disbursing clerks are the only ones who know what items are to be paid therefrom or the condition of the fund at a given time, are not analogous to the case at bar.

II.

No contract can be implied to pay for the extra work where the Government officers had no authority to contract in excess of the appropriation and where the benefit was not voluntarily accepted by the Government.

Appellant does not clearly distinguish whether it is claiming under the original contract for the dredging in excess of the appropriation, or whether it is claiming under an implied or quasi contract for work performed at the request of authorized officers or agents of the United States or by the acceptance of the work done as a benefit conferred. Appellant argues that where work is done under a written contract authorized by law and is in excess of or outside of the contract, and such work inures to the benefit of the United States, an implied contract arises to pay for the reasonable value of the work. (Appellant's brief, p. 8.)

But this argument is fallacious for two reasons: First, as we have shown above, the authority of any officers or agents of the Government to contract on its behalf in dredging this channel was limited by the appropriation. Not being able to contract expressly for this extra work, no contract could arise by implication from their acts. Everyone who deals with Government agents is bound to know the extent of their authority, and the acts of an unauthorized agent can in no way estop the Government.

> *Hart* v. *United States*, 95 U. S. 316–318.
> *Langford* v. *United States*, 101 U. S. 341–346.
> *Moffat* v. *United States*, 112 U. S. 24, 31.
> *Camp* v. *United States*, 113 U. S. 648, 653.
> *Hume* v. *United States*, 132 U. S. 406–414.

Nor can it be argued that the Government can be bound because of the neglect of the inspectors in not keeping accurate account of the materials actually dredged. In the *Hart* case, *supra*, Chief Justice Waite said (318):

> A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect.

As it is not contended that anyone requested the company to dredge material in excess of the amount which could be paid for by the appropriation, it would follow that the request would also have to be implied because of the negligence or

mistakes of the inspectors, which, as is said in the *Hart* case, could not bind the Government.

Second. Since neither party to this contract knew that excessive dredging had been done until after it had been accomplished, the only theory upon which an implied contract could arise would be on the theory of unjust enrichment, viz, that the Government accepted the benefit of this dredging and should, therefore, in good conscience, pay for it.

The law with regard to this situation is stated by Page (Page on Contracts, vol. 3, sec. 1516, p. 2592):

> The rule that voluntary acceptance of benefits shows an implied promise to pay therefor, applies only where the party for whom the services are rendered is free to take their benefit or to reject it. If the services are of such nature that he has no choice but to accept them, he can not be said to accept them voluntarily.

And this rule has been applied in this court and in the Court of Claims. In the case of *Plumley* v. *United States*, 226 U. S. 545–547, Plumley performed extra work of considerable value but recovery was refused because the work was not ordered in writing as provided for by the contract. This work was installed in the Naval Observatory, at Washington, and the case must stand for the proposition that the Government in accepting and using the building in which the extra work had been installed did not voluntarily accept the benefit of the extra work and that no implied contract arose to pay for it.

In *Shipman* v. *United States*, 18 C. Cls. 138, the plaintiff did not recover anything in excess of the amount appropriated for doing work on an authorized highway. The liability rested solely on the appropriation and no implied contract, it was held, could arise to pay him for extra work done.

In the *Hooe case*, 218 U. S. 322, Congress appropriated a specific sum for the rental of quarters for the Civil Service Commission. The rental demanded exceeded the amount appropriated. In addition, the commission used the basement of the building which was not rented for any purpose. No recovery was allowed for the difference between the appropriation and the amount demanded as rental, nor for the use and occupation of the basement on a *quantum meruit* basis. The court said (p. 333):

> The statutes above referred to make it plain that the Secretary was without power to make any express contract for rent in excess of the appropriation made by Congress, particularly where, as here, Congress had taken care to say, in respect of each year's rent, that the appropriation shall be in *full* compensation for the specific purpose named in the appropriation act. It is equally clear that the Secretary could not, by his acts, create a state of things from which, in the absence of legislation on the subject, an implied contract could arise under which the Government would be liable, by reason of its *constitutional* duty, to make just compensation for the use of private property taken for public purposes. * * *

> What we have said is equally applicable to the claim of the plaintiffs for the reasonable value of the use of the basement of the building in question. * * * The conclusion necessarily follows that the Government can not, in this case, be made liable to *suit*, either under an express or implied contract, to pay for the use of plaintiffs' property any amount in excess of the sums appropriated by Congress for that purpose.

Applying the foregoing to this case, no authority under this appropriation act existed in anybody to bind the Government in excess of the appropriation, either by an express or implied contract. Nor did the Government voluntarily accept the benefit of the dredging, for, in order to accept the work done under the contract, it could not reject the extra dredging which had been done. Congress alone has the power to accept the work and authorize payment therefor and it has not been shown where Congress has acted. As said in the *Hooe case supra* (p. 334):

> If the circumstances justify such a course, Congress in its discretion can intervene and do justice to the owner of private property used by officers of the Government in good faith for public purposes, although without direct legislative authority. The plaintiff's remedy is in that direction.

The claim of $1,551 for rock blasted but not dredged under the contract is not recoverable for the same reasons as mentioned above. There was no express or implied contract to pay for this work in excess of the amount appropriated therefor.

III.

As the officers of the Government were not authorized under the act of July 25, 1912, to contract in excess of the appropriation, the officers of the Government were not authorized to pay the contractors out of subsequent appropriations for a different purpose coming into their hands and the amount so paid was properly deducted as a debt from the moneys due the contractor on account of another and different contract.

By the act of October 2, 1914 (ch. 313, 38 Stat. 725), Congress appropriated $20,000,000 "to be immediately available and to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers, for the preservation and maintenance of existing river and harbor works, and for the prosecution of such projects heretofore authorized as may be most desirable in the interests of commerce and navigation * * *." This act was passed after the contract under consideration had been terminated. It was out of this appropriation, however, that the district engineer paid the contractors the sum of $3,046.44 for the materials dredged in excess of the amount which could be paid for under the first contract. (Finding V, p. 22.)

Section 3678, Revised Statutes (Comp. Stat. 1916, sec. 6764), provides:

> All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

As to appropriations for river and harbor improvements, this section is qualified by the act of March 2, 1907 (ch. 2509, 34 Stat., 1073, sec. 1, at p. 1111;

Comp. Stat. 1916, sec. 9887), which provides that money appropriated for the completion of a project may be applied to the prosecution thereof if insufficient for the purpose of completing it.

It is clear then that the only use which could be made of the funds appropriated under the act of October 2, 1914, would be to apply them to the "preservation and maintenance" of this channel or in the "prosecution" thereof.

No authority was given to pay out these funds for work already done. This is true whether or not there was liability to pay for the extra work, because this appropriation act can not be construed as appropriating money to extinguish any previous liability.

So the district engineer, in applying any of this money for the purpose of paying the contractors for the materials dredged in excess of the previous appropriation, paid the money in error. Consequently, when the auditor so held, the money was retained as a debt due the United States from payments due the contractor under another contract.

Whether or not the Government is in error in its contentions I and II, it is submitted that there can be no recovery in this case on the proposition that this money having been paid by the district engineer voluntarily could not be recovered back. It was paid by mistake under a misconstruction of law and it is clear that it could be withheld as a debt. *Gratiot* v. *United States*, 15 Pet., 336. The Government is not bound by the act of its officers in making unauthorized payments under a miscon-

struction of the law. *Wisconsin Central Railroad Company* v. *United States*, 164 U. S. 190. Voluntary overpayments can be recovered. *United States* v. *Burchard*, 125 U. S. 176. And recovery can be had whether the error is one of fact or law (*United States* v. *Saunders*, 79 Fed. 407). See also *McElrath* v. *United States*, 102 U. S. 426.

It is submitted, therefore, that there is no merit in the claim that this money having been paid over to the company by an officer of the Government the Government could not recover it back. If the officer had no authority to pay over the money to the company, the Government could have recovered the money from the company and it had the right to withhold it from payments otherwise due. The company itself must have taken the same view that the only question was whether or not they should have been paid in the first instance for this extra work, because it is found as a fact below that the company, on advice of counsel, "consented" to the Government withholding from the Wacamaw payments the amounts due, but at the same time "protested" in form not shown to the court. (Finding VI, R. p. 23.)

CONCLUSION.

It is respectfully submitted, therefore, that the judgment of the Court of Claims should be affirmed.

FRANK DAVIS, Jr.
Special Assistant to the Attorney General.
GEO. T. STORMONT,
WM. D. HARRIS,
Attorneys.

○